

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Amendment of Part 20 and 24 of the) WT Docket No. 96-59
Commission's Rules -- Broadband)
PCS Competitive Bidding and the)
Commercial Mobile Radio Service)
Spectrum Cap)
)
Amendment of the Commission's) GN Docket No. 96-314
Cellular PCS Cross-Ownership Rule)

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COMMENTS OF OMNIPPOINT CORPORATION

Omnipoint Corporation ("Omnipoint"), by its attorneys, files these comments in response to the Commission's Notice of Proposed Rulemaking.¹ This proceeding is intended to address several matters related to the remaining broadband PCS licenses to be auctioned, Blocks D, E, and F. Omnipoint urges the Commission to consider carefully the competitive impact its decisions in this proceeding will have on small businesses and competition in the wireless market generally.

Unlike previous broadband PCS auctions, the Block D, E, and F licenses will attract a variety of industry participants, all with very different auction agendas and purchasing power. Block A and B licensees will be looking to fill out their nationwide or regional coverage by adding 10 MHz to their existing 30 MHz licenses, or, in other markets, aggregating D, E, and perhaps F licenses to obtain 20 or 30 MHz. In-region cellular interests undoubtedly will be seeking at least 10 MHz (and perhaps more) to fend off competition from new CMRS entrants and to improve the capacity of their networks. In-region Block C small business licensees will

¹ FCC 96-119 (released March 20, 1996) (the "NPRM").

also be seeking D, E or F licenses in order to bypass microwave incumbents or develop a 40 MHz system. Like the A and B licensees, these Block C small businesses will be looking to fill out their regional or national coverage by adding contiguous BTA markets. Finally, small business entrants not successful or not involved in the Block C auction will be looking to the 10, 20 or 30 MHz of spectrum as their final market opportunity. In such an environment, the need for the FCC's small business incentives is at least as great as in the Block C auction.

I. The Commission Should Maintain Incentives for Legitimate Entrepreneurs to Enter Broadband PCS

The Commission should preserve the benefits it offered to entrepreneurs and small businesses in the Block C auction and extend them to the D, E, and F Block. The bidding discounts and favorable installment terms remain as important in the upcoming auction to overcome the problems of lack of access to capital as in the Block C auction. These incentives for small business entry do, in fact, help to overcome the access to capital problems that historically have prevented small businesses from participation in telecommunications. However, to ensure that legitimate small businesses are not outbid by entities willing to "front" for large companies, and to ensure that parties do not abuse the small business incentives, the Commission should make its eligibility process more rigorous than in the Block C auction.

A. The Commission Should Extend the Small Business Installment Plan and Bid Credits to Blocks D and E, as Well as Block F

At ¶ 54 of the NPRM, the Commission seeks comment on whether it should extend small business installment plan provisions to small businesses competing for Block D and E licenses. Omnipoint supports extending the same small business installment terms and bidding credits available with the Block F licenses to the Block D and E licenses. The auction statute² and the

² 47 U.S.C. § 309(j)(3)(B) & (4)(D).

1996 Telecommunications Act³ establish the Commission's continuing obligation to promote small business opportunities in its spectrum auctions. The Commission's PCS orders in PP Docket No. 93-253 have consistently emphasized the need to support small business opportunity in the PCS auctions. *See, Fifth Report and Order*, 9 FCC Rcd. 5532, 5584 (1994) ("The inability of small businesses . . . to obtain adequate private financing creates a serious imbalance between these companies and large businesses in their prospects for competing successfully in the broadband PCS auctions."); *Sixth Report and Order*, 11 FCC Rcd. 136, 159 (1995) ("Our record shows that smaller companies need more assistance accessing capital for broadband licenses . . ."). While the Commission has expressed concern that extending the designated entity benefits to non-entrepreneur bands may not effectively isolate entrepreneurs from large company bidding,⁴ the preservation of Block F for entrepreneurs *only* will continue to address that concern so long as the eligibility review process is improved.

Further, promoting small businesses today is vitally important to our nation's economy as many larger telecommunications firms downsize their operations. As the Chief of the Wireless Bureau recently pointed out, "small businesses play an important role in creating job opportunities and innovation in the marketplace. The U.S. Small Business Administration reports that in 1990, small business accounted for more than 90 percent of all new jobs created. Small businesses also spend more per capita on research and development to develop new products more efficiently than large firms." Opening Remarks by Michele C. Farquhar at "Auctions '96," sponsored by the Office of Communications Business Opportunities, March 15, 1996.

³ 47 U.S.C. § 257 (to be codified) (statute requires the FCC to review and eliminate regulations that act as "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services.").

⁴ *Fifth Memorandum and Order*, PP Dkt. No. 93-253, 10 FCC Rcd. 403, 414- 415 (1994)

Extending small business eligibility to the D and E Block will afford small businesses greater opportunity to: (a) aggregate two or three affordable licenses in a single BTA to create a 20 or 30 MHz PCS system; (b) add an additional 10 MHz, in the case of a Block C small business with a 30 MHz license,⁵ in order to avoid microwave incumbent problems and deploy more rapidly;⁶ and (c) choose from a greater variety of licenses, offering more flexibility during the auction, which will tend to yield a greater number of small business licensees. In turn, the business options derived from this flexibility will make the entrepreneur a better investment case to financial backers. All of these direct and indirect effects will increase the likelihood of small business participation in PCS, in fulfillment of the Commission's statutory obligations. Finally, more participants vying for the D and E licenses will undoubtedly increase the auction revenues to the government from both small business and non-entrepreneur participants.

B. The Commission Needs to Tighten the Eligibility Process for Entrepreneur Benefits

While Omnipoint believes that the Commission should continue to support small businesses in the auction, the Commission must also ensure that entities reaping these government benefits are, in fact, small businesses or entrepreneurs, as intended by the rules. As is well known, Omnipoint believed that the Commission's qualification process for the Block C auction created a magnet for large entities in need of small business "fronts," allowing large entities to dominate what should have been an entrepreneur's auction. This issue was the center of Omnipoint's case last year before the D.C. Circuit, and was the essential issue in Omnipoint's

⁵ Id. at 4981 ("we believe that some new entrants may need to acquire 40 MHz to fully realize their business plans . . .").

⁶ Memorandum Opinion and Order, GN Dkt. No. 90-314, 9 FCC Rcd. 4957, 4979 (1994) (FCC changes license allocations from 20 to 30 MHz in order to encourage rapid introduction of service, avoid incumbent microwave relocation costs, and facilitate economies of scale).

attempt at settlement negotiations with the Commission during the case.

The Block C auction seems to have confirmed Omnipoint's concerns. A significant number of other auction participants, and even parties that initially opposed Omnipoint's position concerning the Sixth Report and Order, have now voiced similar concerns. These parties have even threatened FCC and court litigation to remedy what they perceive to be a serious abuse by some parties that have participated in the Block C auction. Omnipoint understands those concerns. When ineligible entities participate in the entrepreneur-band auctions, these ineligible participants drive up the prices during the auction beyond what legitimate participants can pay and, in some cases, even drive legitimate participants from the auction entirely. The Commission's rules must not only weed out these participants in the long-form application process (requiring a re-auction of licenses), but also must prevent these entities from even entering in the entrepreneur-band auction process. Therefore, Omnipoint urges the Commission to consider carefully the consequences to the Block C auction, and improve its process so that ineligible entities are prevented from subverting the purposes of future entrepreneurs' auctions.

C. Legitimate Block C Applicants Should be Eligible In Subsequent Auction(s) Involving Entrepreneur-Band Benefits

The Commission should presume that any legitimate Block C long-form applicant is eligible to participate in the subsequent auction(s) involving entrepreneur-band benefits. While Omnipoint is not confident that all Block C short-form applicants are, in fact, eligible as "entrepreneurs," using the Block C long-form application as another input for determining eligibility for the subsequent auction(s) involving entrepreneur-band benefits will help to avoid repeated abuses. It is critical that all legitimate Block C applicants be allowed to participate in all future entrepreneur-band auctions since it is the only way that the resulting fragmented coverage of the geographical areas from the Block C auction can be filled in. Of course, if a long-form applicant is found to be ineligible to hold a Block C license, that decision may also disqualify it for any subsequent auction involving entrepreneur-band benefits.

This approach is also generally consistent with the Commission's rule concerning transfers of "entrepreneur" licenses in years three to five. Under Section 24.839(d)(2) of the Commission's rules, an assignee must ordinarily demonstrate its eligibility to hold a Block C or F license at the time of assignment. However, a holder of a Block C or F license meets the eligibility criteria if the "assignee or transferee holds other license(s) for frequency Blocks C and F and, at the time of receipt of such license(s), met the eligibility criteria set forth in §24.709." This rule promotes the growth of entrepreneur businesses by allowing them to expand past the \$125 million revenue/\$500 million asset caps and encourages market aggregation of licenses by small businesses. It also utilizes the Commission's resources efficiently by avoiding detailed review of an entity that has already been deemed an acceptable "entrepreneur." These same rationales apply to Block C licensees' participation in the Block F auction.

II. Auction Timing and Auction Procedures Should Provide Small Businesses With a Fair Opportunity to Compete in the Auction

For the reasons stated above, Omnipoint advocates that the Commission commence a single Block D, E, and F auction expeditiously, so long as it leaves adequate time to engage in meaningful review of the applicants before the next auction.

In addition, the Commission should either hold no more than one auction round per day or do so only at the very end of the auction if no other means can bring the auction to a close. The change to multiple rounds per day in the Block C auction caused extreme hardship for many bidders, and forced small businesses to eliminate many otherwise necessary decisional processes in the auction. With over 100 bidders active on 493 Block C licenses even at the end of the Block C auction, the Commission's decision to go to multiple rounds per day gave small businesses *less than 30 seconds* to review the results for each BTA, let alone make a decision. An auction of the Block D, E and F licenses will involve 1,479 licenses and bidders with different eligibility requirements, bidding credits and payment terms. These factors will make that auction even more complex for small businesses participation, and so the Commission must

design the auction that is fair for such businesses.

In general, small businesses operating on limited resources cannot maintain an intelligent and cohesive bidding regimen (let alone manage other aspects of their business) at multiple rounds per day. Multiple rounds per day means that almost no other business can be conducted and no business meetings or travel plans made for the individuals involved. This situation puts the small business bidder on a constant state of "red alert" as they anticipate the next round of attacks from other, perhaps larger, bidders, and gives them only seconds to make multi-billion dollar decisions. It is further compounded by the fact that the resources of small businesses will need to compete with well-financed decision support services of the LECs and other large companies bidding for the Block D and E licenses. Because it is critical to small business success for opportunities with the D and E licenses, the Commission should auction all three blocks together but hold no more than one round per day.

To address the issue of ensuring expeditious auctions, the Commission should seek comment and input from the public on other less burdensome methods that are fair for all participants. There are simply other ways to expedite the auction besides elimination of the time necessary to make round-by-round decisions.

Respectfully submitted,

OMNIPOINT CORPORATION

By:



Mark J. Tauber

Mark J. O'Connor

Piper & Marbury L.L.P.
1200 19th Street, N.W.
Seventh Floor
Washington, D.C. 20036
(202) 861-3900

Its Attorneys

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